

Internal Revenue Service
memorandum

TL-N-5255-89

WHEARD CC:TL:TS

date: JUN 27 1989

to: District Counsel, Hartford

NA:HAR

from: Assistant Chief Counsel (Tax Litigation)

CC:TL

subject: TEFRA One Year Assessment Date

This is in response to your request for Tax Litigation Advice dated March 15, 1989. Specifically you requested advice as to the computation of the statute of limitations when the period for petitioning FPAA/FSAA has expired.

ISSUE

What is the applicable statute of limitations when no petition is filed, with respect to a notice of final partnership administrative adjustment (FPAA) or notice of final subchapter S corporation administrative adjustment (FSAA), within the periods provided in I.R.C. §§ 6226(a) and (b).

CONCLUSION

The period for assessing "defaulted" partnership items is provided under section 6229(a), which is further extended for the period for petitioning an FPAA/FSAA pursuant to section 6229(d)(1), plus an additional year under section 6229(d)(2). If an affected item notice of deficiency is issued pursuant to section 6230(a)(2)(A)(i) during the one year suspension period of section 6229(d)(2), the period for assessment under section 6229(a) will be further suspended pursuant to section 6503(a), but only with respect to affected items requiring partner level determinations.

Note that the expiration of the period for filing a petition with respect to an FPAA or FSAA, or the entry of decision in a litigated case, does not operate to convert the defaulted items to nonpartnership items. Only events listed under section 6231(b) operate to convert partnership and affected items to nonpartnership items. Section 6229(f) states that the

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period for assessing converted partnership and affected items "shall not expire before" one year after the conversion. The "shall not expire" language raises a question whether we have the longer of the section 6229(f) one year or the time remaining on the section 6501 statute. Due to litigation hazards we recommend that assessment of converted items must occur within the period provided by section 6229(f).

FACTS

You received a request for technical advice from the Examination Division requesting advice on the computation of the statute of limitations when the period for filing a petition with respect to an FPAA/FSAA expires. The request from Exam raised questions as to the interrelationship between section 6501 and the partnership statute of limitations under section 6229(a). It is unclear whether Exam may have confused the one year periods for assessment under sections 6229(d)(2) and 6229(f).

DISCUSSION

Prior to the enactment of TEFRA the statute of limitations with respect to the assessment of partnership items was clearly the same as the statute of limitations for nonpartnership items: I.R.C. § 6501. TEFRA enacted section 6229(a) with respect to partnership and affected items.

I. SECTION 6501 (NONPARTNERSHIP ITEMS) AND SECTION 6229(A) (PARTNERSHIP AND AFFECTED ITEMS) ARE SEPARATE STATUTES

There are two possible interpretations of the general rule found in section 6229(a): (1) the three year period of limitations for all items set out by section 6501(a) covers all items including partnership items (hereinafter referred to as the "statute extension interpretation"); (2) section 6229(a) sets out a separate three year period of limitations for partnership items, while section 6501 refers only to nonpartnership items (hereinafter referred to as the "separate period interpretation"). The Tax Litigation Division has taken the more conservative separate statute approach in order to foster protection against blown statutes.^{1/} In addition, the recent Ninth Circuit opinion in Kelley v. Commissioner, No. 87-7413 (9th Cir. June 7, 1989), reversing the Tax Court and holding that,

^{1/} Note that we have recently authorized a test case in which we have taken the position that section 6229(a) merely operates to extend the period for assessment under section 6501 with respect to partnership items. We will not authorize this approach if the section 6229 statute remains open. Even in those cases where only the section 6501 statute remains open, special approval must be obtained from this office.

where the statute of limitations for an S corporation has expired, the Service could not make adjustments to the open shareholder returns, supports this approach.

- A. If No Petition is Filed With Respect to an FPAA, the Period for Assessment is Computed Solely Under Section 6229(a) and its Extension and Suspension Provisions

Given the above litigation position, the period for assessing partnership and affected items should be computed based solely on section 6229(a), and its extension and suspension provisions.^{2/} Partnership and affected items which have converted to nonpartnership items under section 6231(b), however, must be assessed prior to the expiration of the period provided for under sections 6229(f). The expiration of the period for petitioning an FPAA/FSAA does not operate to convert partnership and affected items to nonpartnership items. Thus, the Service should look solely to provisions of section 6229(a), and its extension and suspension periods, to determine the period for assessment when the period for filing a petition with respect to an FPAA/FSAA has expired (unless the partnership items for a particular partner have previously converted under section 6231(b), e.g., through settlement or bankruptcy).

Section 6229(a) provides:

General Rule.--Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of--

- (1) the date on which the partnership return for such taxable year was filed, or
- (2) the last day for filing such return for such year (determined without regard to extensions).
(emphasis supplied)

Once a notice of final partnership administrative adjustment

^{2/} Section 6244 provides that the TEFRA partnership provisions generally also apply with respect to subchapter S corporations and, thus, section 6229(a) is also applicable to S corporations.

(FPAA) or a notice of final S-corporation administrative adjustment (FSAA) is issued, section 6229(d) becomes applicable:

Section 6229(d) provides:

Suspension When Secretary Makes

Administrative Adjustment.-If notice of a final partnership administrative adjustment with respect to any taxable year is mailed to the tax matters partner, the running of the period specified in subsection (a) (as modified by other provisions of this section) shall be suspended-

(1) for the period during which an action may be brought under section 6226 (and, if an action with respect to such administrative adjustment is brought during such period, until the decision of the court in such action becomes final), and

(2) for 1 year thereafter.
(emphasis supplied)

Thus, following the expiration of the periods for filing a petition with respect to an FPAA/FSAA under sections 6226(a) and (b),^{3/} the Service will have at least one year to: (1) assess the partnership and affected items, and (2) issue a notice of deficiency with respect to affected items requiring partner level determinations (e.g., penalties).

Within the above period, if the Service issues an affected item notice of deficiency for affected items requiring partner level determinations as authorized pursuant to section 6230(a)(2)(A)(i), the period for assessment under section 6229(a) will be further suspended solely with respect to the affected items requiring partner level determinations pursuant to section 6503(a).

^{3/} Section 6226(a) provides for a 90 day period during which the tax matters partner may petition. Section 6226(b) provides for a 60 day period during which a notice partner may petition if the TMP does not petition. Note that, if either of these periods end on a holiday, the period for petitioning may be slightly longer than 150 days. See, e.g., Transpac Drilling Venture 1982-22 v. Commissioner, 87 T.C. 874 (1986).

Section 6503(a) provides, as relevant here, as follows:

The running of the period of limitations provided in . . . section 6229, but only with respect to a deficiency described in section 6230(a)(2)(A)4/ . . . shall . . . be suspended for the period during which the Secretary is prohibited from making the assessment . . . and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final . . . and for 60 days thereafter. (emphasis and footnote supplied)

1. Tacking

Note that under section 6229(d) the period for assessment is "suspended" for the period during which the notice of FPAA may be petitioned plus one year after the FPAA/FSAA is issued if no petition is filed. Thus, if any time remained on the three year period for assessment under section 6229(a) at the time the FPAA/FSAA was issued, the remaining time on the three year statute would not begin to run until after the one year period under section 6229(d)(2) had expired. For instance, if an FPAA was issued two years and eleven months into the section 6229(a) period, the remaining month should be "tacked on" to the end of the one year "suspension" period.

Because of potential litigation hazards, however, we recommend that all assessments and issuances of affected item notices occur within the one year suspension period. The courts are split as to whether any tack on period exists under similar statutes. See Hoosac Mills Corp. v. Commissioner, 75 F.2d 462 (1st Cir. 1935) (notwithstanding "suspension" of section 6501 by stay provision, no tack on period exists). Contra Ramirez v.

4/ Section 6230(a)(2)(A) provides:

(2) **Deficiency proceedings to apply in certain cases.-**

(A) Subchapter B shall apply to any deficiency attributable to-

(i) affected items which require partner level determinations, or

(ii) items which have become nonpartnership items (other than by reason of section 6231(b)(1)(C)) and are described in section 6231(e)(1)(B). (emphasis supplied)

United States, 538 F.2d 888 (Ct. Cl. 1976); Clark v. Commissioner, 90 T.C. 68, 71 (1988).

II. CONVERTED PARTNERSHIP AND AFFECTED ITEMS ARE SUBJECT TO SECTIONS 6229(f) AND 6501

A. Expiration of Period for Filing a Petition With Respect to an FPAA/FSAA and Entry of Decision in Petitioned Cases Do Not Convert Partnership and Affected Items to Nonpartnership Items

The one year suspension period under section 6229(d)(2) is often confused with the one year period under section 6229(f) for assessing partnership and affected items which have converted to nonpartnership items under section 6231(b). It is important to remember that neither the expiration of the periods provided under section 6226(a) and (b) for petitioning an FPAA or FSAA nor the occasion of the Tax Court's decision becoming final in a petitioned case pursuant to section 7481, will operate to convert the adjusted items to nonpartnership items.

Section 6229(f) provides as relevant here:

(f) **Items Becoming Nonpartnership Items.**—If, before the expiration of the period otherwise provided in this section for assessing any tax imposed by subtitle A with respect to the partnership items of a partner for the partnership taxable year, such items become nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, the period for assessing any tax imposed by subtitle A which is attributable to such items (or any item affected by such items) shall not expire before the date which is 1 year after the date on which the items become nonpartnership items. . . . (emphasis supplied)

Section 6229(f) states that the period for assessing converted partnership and affected items "shall not expire before" one year after the conversion. The "shall not expire" language raises a question whether we have the longer of the section 6229(f) one year period or the time remaining on the section 6501 statute.

Section 6501, by its own terms, applies to all taxable items under subtitle A. With the enactment of TEFRA, a separate statute of limitations was enacted with respect to partnership items. I.R.C. § 6229(a). Thus, as discussed above, section 6501 may no longer apply to partnership items. Unquestionably,

however, section 6501 applies to nonpartnership items. When an event occurs which is listed under section 6231(b), partnership items are converted to nonpartnership items. I.R.C. § 6231(b)5/. Thus, converted partnership and affected items will be subject to the period for assessment under sections 6501. Because the period for assessment under section 6501 may have already expired or be close to expiring at the time of conversion, it was necessary for Congress to enact 6229(f) which provides that the period for assessing converted partnership and affected items "shall not expire" before the date which is one year after the conversion.

Since no court has addressed our interpretation of the applicable statute of limitations with respect to converted partnership items, we strongly recommend that all assessments of converted items occur within the period provided under section 6229(f). Nevertheless, we will defend assessments made after the

5/ Partnership items convert to nonpartnership items by reason of one of the events listed in I.R.C. § 6231(b) which also incorporates events under section 6231(c). The most frequent events which operate to convert partnership and affected items to nonpartnership items are the execution of a settlement agreement with a partner regarding partnership items and the filing for bankruptcy. See I.R.C. § 6231(b)(1)(C) and Temp. Treas. Reg. § 301.6231(c)-7T.

Events that cause conversion are:

- (1) the Secretary mails the partner a notice that such item shall be treated as a nonpartnership item, in situations relating to inconsistent treatment or refund suits under section 6227;
- (2) the partner files suit in Court after the Secretary fails to allow an AAR;
- (3) the Secretary enters into a settlement agreement with the partners;
- (4) the change occurs due to Secretary's failure to provide proper notice under I.R.C. § 6223; or
- (5) the conversion occurs due to the I.R.C. § 6231(c) special enforcement areas:
 - a. termination or jeopardy assessments,
 - b. notification of conversion due to criminal investigations,
 - c. indirect method of proof cases,
 - d. bankruptcy and receivership situations.

one year period provided under section 6229(f) has expired but which is made within the period provided under section 6501.

Please refer any questions you may have to Bill Heard at FTS 566-3233.

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